



airman certificate.<sup>2</sup> The law judge agreed with the Administrator that because the respondent had been convicted under 26 U.S.C. § 7201 for not paying federal income taxes for the years 1983 through 1986,<sup>3</sup> he does not possess the "good moral character" that is a prerequisite for the issuance of an ATP certificate under section 61.151(b) of the Federal Aviation Regulations.<sup>4</sup>

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<sup>2</sup>The Administrator had issued an order revoking respondent's airline transport pilot certificate (No. 001920173) on October 14, 1992. At the hearing the law judge allowed the Administrator to convert the case to an emergency proceeding, after which the Administrator demanded the immediate surrender of respondent's ATP certificate and tendered to the respondent a temporary commercial pilot certificate for his use until, presumably, a permanent commercial certificate could be sent to him.

While the Board does not review the Administrator's judgments as to which cases should be prosecuted as emergencies, see, e.g., Administrator v. Anderson, 5 NTSB 564 (1985), we can review a claim, such as the one respondent advances here, that a certificate holder's ability to defend against a nonemergency order was prejudiced by the conversion of the case to an emergency at his hearing. However, given our judgment on the respondent's challenge to the merits of the Administrator's order, we have no occasion to decide the procedural point he raises.

<sup>3</sup>Based on the conviction, the respondent was originally sentenced to two years' imprisonment on each of four counts in the indictment, fined \$700,000, and ordered to pay the sum of \$81,816 as restitution (i.e., the amount of taxes he should have paid in the four years in which he filed no returns, plus penalties and interest). On appeal the district court's judgment was vacated to the extent it ordered the payment of restitution.

See United States v. Neff, U.S.C.A. No. 91-5007, February 28, 1992 (11th Cir.). The district court subsequently, on respondent's motion, reduced the sentence to one year imprisonment and a fine of \$10,000 on each of the four counts. See U.S. v. Neff, No. 90-209-CR-MORENO, S.D.Fla., September 23, 1992. It appears that the respondent was incarcerated in December, 1990, and released from prison in November, 1992.

<sup>4</sup>The revocation order and the initial decision essentially conclude that respondent's conviction establishes a violation of section 61.151(b). However, since that regulation merely sets forth the eligibility requirements for an applicant for an ATP certificate, we do not believe it can be violated in the ordinary

FAR, 14 CFR Part 61.<sup>5</sup> We reverse.<sup>6</sup>

The Administrator's argument that respondent lacks good moral character is based primarily on two circumstances. The first is that the respondent, contrary to "the laws of the United States government" (see Order of Revocation at paragraph 4), did not file federal income tax returns in the years for which he was convicted of tax evasion. The second circumstance relates to the respondent's representations to his airline employer, on Withholding Allowance Certificates (W-4 forms), that his income for those tax years was exempt from federal taxation. Those representations, according to the order of revocation, which served as the complaint in this proceeding, were "intentionally false in that [respondent's] applicable income was not exempt

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sense of that term. Rather, we assume that the Administrator and, apparently, the law judge view the conviction, and the circumstances underlying it, as demonstrating that the respondent no longer possesses the good moral character an ATP certificate holder must exhibit in order to continue to exercise the privileges that certificate confers. We intimate no judgment on whether the regulation in fact imposes an ongoing requirement, as respondent does not argue that the regulation does not provide an adequate predicate for this action or the sanction sought by the Administrator.

<sup>5</sup>FAR section 61.151(b) provides as follows:

§61.151 Eligibility requirements: General.

To be eligible for an airline transport pilot certificate, a person must--

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(b) Be of good moral character.

<sup>6</sup>The Administrator has filed a reply brief opposing the appeal. He has also filed a motion, opposed by respondent, to strike, as evidence that should have been submitted during the hearing, several exhibits respondent attached to his appeal brief. The motion to strike is granted.

from income tax withholding, and [he] did owe Federal income taxes for the applicable years" (Id. at paragraph 7). Each of these circumstances (namely, the "evading the payment of...income taxes and failing to file applicable income tax returns" and the "intentionally false statements on...W-4 forms") demonstrates, according to the complaint, that respondent lacks the moral character required of the holder of an ATP certificate. We find ourselves unpersuaded that this record supports such a conclusion.

The Administrator cites no case in support of the proposition that a person's character is necessarily drawn in issue whenever a breach of a tax law is shown, and the cases cited in respondent's brief appear to establish, without contradiction by the Administrator, that, without more, neither the nonpayment of taxes nor the failure to file a required return would amount to an offense of moral turpitude. See In the Matter of Shorter, 570 A.2d 760 (D.C.App. 1990) and In re Kerr, 611 A.2d 551 (D.C.App. 1992). Nevertheless, the Administrator argues that a finding of lack of good moral character under FAR section 61.151(b) is consistent with the Board's decision in Administrator v. Konski, 5 NTSB 275 (1985), wherein we indicated our view that the regulation "contemplate[d] a broader range of morally objectionable behavior" than that normally viewed as indicative of moral turpitude. We do not agree that that case supports the Administrator's position here.

In Konski, the respondent had falsely represented on three

aircraft registration applications that he was a U.S. citizen. We held that an ATP certificate "holder who...knowingly and repeatedly submits to the government false information on a material matter displays a level of personal integrity considerably below any reasonable definition or commonly accepted understanding of the concept of 'good moral character.'" Id. at 276. We see significant differences between Konski and this case.

Respondent Konski's Israeli citizenship was an objectively ascertainable fact he did not dispute before the Board, it was dispositive of his right to register an aircraft in this country, and the government could be expected to rely on the applications on which he claimed U.S. citizenship. Consequently, his false statements could be viewed as a purposeful effort to deceive the government into registering an aircraft he could not lawfully register. Respondent Neff's claimed exemption from withholding, on the other hand, did not mislead the government as to his income (which, of course, is separately reported to the Internal Revenue Service, "IRS," by an employer on Form W-2), had no bearing on, and did not alter, his ultimate income tax liability, and was clearly accomplished in a manner designed to attract attention to respondent's position that he could not be legally required to pay any income taxes, not to misrepresent his entitlement to have no taxes withheld.<sup>7</sup>

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<sup>7</sup>The W-4s respondent submitted to his employer, consistent with his assessment that the government could not legally tax his income, had various attachments and contained many extraneous

More to the point, while respondent's views on the tax laws may be non-mainstream, wrongheaded, or just plain indefensible, given the frequency with which the courts have rejected similar challenges, we think it a misnomer to label respondent Neff's claimed exempt status for his income as intentionally false. Determining the status of income for purposes of a W-4 involves the exercise of legal judgment, not simply the recording of factual information. It is, we think, more appropriate to view respondent's claim on his W-4s that his income was exempt from income tax as incorrect, invalid, or simply inconsistent with the overwhelming weight of legal opinion. The W-4s clearly were, in context, a product of respondent's deeply held, however misguided, view that the government lacks the legal authority to tax income on individuals; they were not attempts to deceive or advance information he knew to be untrue.<sup>8</sup> Konski is inapposite.

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comments or notations that obviously were intended as a form and expression of tax protest. See Adm. Exh. A-1. For example, on one W-4 respondent, in the box for his Social Security number, wrote "Revoked--Mark of the Beast." He also noted next to his signature on several of the W-4s: "This contract repudiated." It appears that his payroll office, which appears to have understood his position full well, was eventually directed by the IRS to withhold taxes from his wages, notwithstanding the exempt status claimed on the forms.

<sup>8</sup>At the same time, we hasten to add that we do not endorse the method respondent chose to express his disagreement with the income tax laws. He could, of course, have paid his taxes under protest and filed for a refund, a procedure which eventually would have produced a judicial resolution of his legal objections. However, our task here is not to judge the wisdom of respondent's course of action, but to determine whether it revealed a character flaw establishing that respondent is morally deficient for purposes of FAR section 61.151(b).

We do not hold that the failure to file a tax return, pay taxes, or properly fill out a W-4 could never raise a moral or ethical concern of a magnitude that would justify a conclusion that the character of the individual doing so had been thereby fatally besmirched. We do hold that where, as in the circumstances of this case, such conduct, however unlawful it may be held or viewed to be, flows from a genuine objection to the validity of the tax sought to be collected, it will not support a finding that the objecting party lacks good moral character.<sup>9</sup> Consequently, we do not find that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order.<sup>10</sup>

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<sup>9</sup>To the contrary, some might consider respondent's steadfast adherence to his view that the income tax is unlawful as a sign of an individual who stands by his principles. In this connection, counsel for the Administrator has suggested that evidence of respondent's bad moral character can be seen in the fact that respondent, despite his incarceration, has not abandoned his position on the validity of the income tax. We do not concur in the implication that people of good moral character are not free to disagree with the tax laws of the country.

<sup>10</sup>Counsel for the Administrator suggests that respondent is not fit to be an ATP certificate holder because he may ignore air traffic control instructions with which he disagrees. We think that if the Administrator harbored any legitimate concern in this respect he would have sought the revocation of all of respondent's pilot authority, not just his ATP privileges.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The respondent's appeal is granted, and
2. The emergency order of revocation and the initial decision are reversed.

VOGT, Chairman, COUGHLIN, Vice Chairman, and HART, Member of the Board, concurred in the above opinion and order. Members LAUBER and HAMMERSCHMIDT did not concur.